STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 4, 2003
v	No. 234034 Wayne Circuit Court
CHARLES STROUSE, Defendant-Appellant.	LC No. 00-003993

Before: White, P.J. and Kelly and Gribbs*, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of second-degree murder, MCL 750.317 and burning of a dwelling house (arson), MCL 750.72.[1] The trial court sentenced defendant to concurrent sentences of fifteen to forty years' imprisonment for the second-degree murder conviction and seven to twenty years' imprisonment for the arson conviction. We affirm.

I. New Trial

Defendant first argues that the trial court abused its discretion in denying his motion for a new trial based on newly discovered testimonial evidence that the victim, Linell McKeller, may have died before defendant set his house on fire. We disagree. A trial court's decision regarding a motion for a new trial is reviewed for an abuse of discretion. *People v Leonard*, 224 Mich App 569, 578; 569 NW2d 663 (1997). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001).

In order to merit a new trial on the basis of newly discovered evidence, a defendant must demonstrate that "(1) the evidence itself, not merely its materiality, is newly discovered, (2) the evidence is not merely cumulative, (3) the evidence is such as to render a different result probable on retrial, and (4) the defendant could not with reasonable diligence have produced it at trial." *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998). Newly discovered

[1] Defendant was charged with first-degree felony murder, MCL 750.316(1)(b) and arson.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

evidence is not a ground for a new trial where it would merely be used primarily for impeachment purposes. *People v Davis,* 199 Mich App 502, 516; 503 NW2d 457 (1993).

In this case, it is clear that the "newly discovered evidence" would not render a different result probable on retrial. We first observe that the motion for new trial was supported by unsworn affidavits setting forth hearsay. Further, the proposed evidence merely set forth the *possibility* that McKeller may have been beaten with a frying pan before the fire. In contrast, the evidence at trial overwhelmingly established, without conjecture, that McKeller was alive when the fire was set. There was substantial evidence that he was alive after he reached his house. Additionally, the fire inspector concluded that McKeller appeared to have died from smoke inhalation. Similarly, the medical examiner concluded that McKeller died from smoke and soot inhalation based on soot found in his airway. Because the evidence raised only the possibility that McKeller was dead when taken to his house, which possibility was undermined by considerable evidence to the contrary, we find that defendant failed to show that the evidence would have rendered a different result probable on retrial. Therefore, the trial court did not err in denying defendant's motion for new trial on this basis.

II. Expert Witness

Defendant next argues that the trial court abused its discretion in denying his request to appoint an expert witness. We disagree. This Court reviews a trial court's decision whether to appoint an expert witness for an abuse of discretion. *People v Herndon,* 246 Mich App 371, 399; 633 NW2d 376 (2001).

An indigent defendant seeking the appointment of an expert witness at public expense must show that he "cannot safely proceed to trial" without the proposed witness. . . ." MCL 775.15; *Herndon, supra* at 399. Defendant must show a nexus between the facts of the case and the need for an expert. *Leonard, supra* at 582. Defendant must also make a timely request for the desired expert. *Id.* at 584.

We find the trial court did not abuse its discretion in denying defendant's request for an arson expert witness. For the trial court to appoint an expert witness, it must be shown that "that such accused person is poor and has not and cannot obtain the means to procure the attendance of such witness at the place of trial." MCL 775.15. Here, defense counsel asserted that defendant was indigent, but provided no evidence that defendant was poor and could not procure the attendance of an expert witness. Even after the trial court permitted defense counsel to brief the issue and stated that it would reconsider the request, defendant still provided no evidence to support his request. Additionally, defendant failed to demonstrate a nexus between the facts of the case and the need for an expert. *Leonard, supra* at 582. Therefore, we find the trial court properly denied defendant's request to appoint an expert witness at public expense.

III. Reckless Abandonment

Defendant next argues that the trial court committed reversible error in finding that defendant demonstrated, "a reckless abandonment for life," but convicting defendant of second-degree murder. Defendant argues that the trial court's finding is more consistent with an intent to convict him of involuntarily manslaughter. We disagree. Questions of law and questions of

application of the law to the facts receive de novo review. *People v Barrera*, 451 Mich 261, 269, n 7; 547 NW2d 280 (1996).

Contrary to defendant's contention, the trial court's use of the language, "a reckless abandonment for life," appears to be an attempt to justify a conclusion that defendant did not commit first-degree felony murder. Moreover, the trial court also stated, in its findings of fact and conclusions of law, that defendant "had the intent to kill or at least the intent to do great bodily harm or that he knowingly created a very high risk of death." Therefore, the trial court properly applied the law to the facts in convicting defendant of second-degree murder. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993).

IV. Sufficiency of Evidence

Defendant next argues the prosecution failed to present sufficient evidence for a rational factfinder to conclude beyond a reasonable doubt that defendant possessed the requisite intent to commit second-degree murder. We disagree.

"In reviewing the sufficiency of the evidence presented in a bench trial, an appellate court views the evidence de novo and in the light most favorable to plaintiff to determine whether the trial court could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000), aff'd 466 Mich 39 (2002). The elements of second-degree murder are: (1) death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996). "Malice is the intent to kill, the intent to do great bodily harm, or the intent to create a high risk of death or great bodily harm without knowledge that such is the probably result. Malice may be inferred from the facts and circumstances of the killing. *People v Harris*, 190 Mich App 652, 659; 476 NW2d 767 (1991).

Viewed in the light most favorable to the prosecution, sufficient evidence was presented for a rational trier of fact to conclude that the essential elements of second-degree murder were proven beyond a reasonable doubt. Although defendant admitted to setting McKeller's house on fire, he argues that he believed the fire was extinguished and that he was told no one was in the house before he burned it. However, the prosecution presented evidence that defendant arrived at Becky Dorie's residence and was told that McKeller had slapped Becky in the face. Defendant told Becky, "nobody hits you, baby." Defendant then said he was going to the store, but went to Daryl Dorie's house which was next to McKeller's house. He arrived at Daryl's house, admittedly angry, and immediately asked which house belonged to McKeller. Defendant retrieved a can of gasoline from his tow truck. He poured gasoline on McKeller's porch, acquired a cloth from a garbage can, broke McKeller's window, lit the cloth on fire and threw it in the house. Later, after admitting that he set McKeller's house on fire, defendant stated that McKeller would never hit Becky again and that he took care of the problem. Therefore, we find there was sufficient evidence for a rational factfinder to conclude that defendant had the requisite intent to commit second-degree murder.

V. Sentencing

Finally, defendant contends that the trial court should not have assessed any points for offense variable five (OV 5) for both of his convictions.[2] Defendant failed to submit a copy of his presentence report with this appeal, and thus this issue is not properly preserved. MCR 7.212(C)(7); *People v Rodriguez*, 212 Mich App 351, 355; 538 NW2d 42 (1995). Notwithstanding this failing, we find, based on the sentencing hearing record, that defendant is not entitled to resentencing.

A sentencing court has discretion in determining the number of points to be scored if evidence of record adequately supports a particular score. *People v Cain*, 238 Mich App 95, 129-130; 605 NW2d 28 (1999). Pursuant to MCL 777.35(1)(a), fifteen points are assessed if "Serious psychological injury requiring professional treatment occurred to a victim's family." The points are to be assessed "if the serious psychological injury to the victim's family may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive." MCL 777.35(2).

With respect to the second-degree murder conviction, the trial court properly scored fifteen points for OV 5. The prosecution informed the trial court at sentencing that the victim's mother had spoken with the probation department regarding her intent to seek counseling for the psychological injury caused by the murder of her son. The victim's mother, who must live with the knowledge that her son died in a fire that burned over forty-five percent of his body, could have suffered the type of psychological injury that may require professional treatment.

Defendant also argues that the trial court improperly scored fifteen points for OV 5 in regard to the arson conviction. We agree. Pursuant to MCL 777.22(1), OV 5 is scored for "homicide, attempted homicide, or assault with intent to commit murder." Because arson is not listed among the enumerated crimes, the trial court improperly scored fifteen points under OV 5 for the arson conviction. However, the reduction in the OV 5 score from fifteen points to zero points would not affect the sentencing guidelines range. Because defendant's minimum sentence falls within the proper guidelines range, any error in scoring OV 5 for the arson conviction was harmless, and this Court must affirm the sentence. MCL 769.34(10). However, defendant's records should reflect a score of zero for OV 5, and we remand this case to the trial court for the ministerial task of issuing an amended sentencing information report reflecting that adjustment.

Affirmed.

/s/ Helene N. White
/s/ Kirsten Frank Kelly
/s/ Roman S. Gribbs

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[2] The acts giving rise to defendant's convictions occurred on March 28, 2000; therefore, the legislative sentencing guidelines apply. MCL 769.34(2).